STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 14, 2007
v	No. 273422 Wayne Circuit Court
ANTONIO DAVIS, Defendant-Appellee.	LC No. 06-004397

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant is charged with first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. After a pretrial motion hearing, the trial court denied the prosecution's motion to admit statements defendant made while in jail, holding that since some of the statements made reference to defendant's alibi, admitting the statements would impermissibly shift the burden of proof to defendant. The prosecution appeals by leave granted.[1] Because the probative value of the evidence would not be substantially outweighed by the danger of unfair prejudice, we reverse.

On appeal, the prosecution argues that the trial court abused its discretion by holding that the three recorded jailhouse conversations were inadmissible. We agree.

This Court reviews preserved evidentiary issues for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231, on rem 258 Mich App 679; 672 NW2d 533 (2003).

[1] The prosecution's application for leave with this Court was initially denied. The prosecution then filed an application for leave to appeal with the Supreme Court and, in lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted.

The prosecution argues that defendant's jailhouse statements concerning alibi and self-defense defenses are party admissions, and hence, admissible as non-hearsay, pursuant to MRE 801(d)(2)(A). An admission by a party-opponent is not hearsay if the statement is offered against a party and is the party's own statement. MRE 801(d)(2)(A); *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). "[A]ny out-of-court statement made by a defendant which is offered against that defendant is an admission." *People v Brown*, 120 Mich App 765, 782; 328 NW2d 380 (1982).

Defendant's party admissions must satisfy MRE 401, MRE 402, and MRE 403 to be admissible. Generally, relevant evidence is admissible, and evidence is relevant if it has any tendency to make the existence of any fact that is at issue more probable or less probable than it would be without the evidence. MRE 401; MRE 402; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888, on second rem 242 Mich App 656; 620 NW2d 19 (2000).

The prosecution argues that defendant's jailhouse statements are relevant as circumstantial evidence of defendant's guilt, regardless of whether defendant testifies, because they are false exculpatory statements. False exculpatory statements made to police or in sworn testimony may be offered as circumstantial evidence tending to show a defendant's guilty conscience, where the defendant tries "to lead suspicion and investigation in some other direction by false or covert suggestions or insinuations." *People v Wackerle*, 156 Mich App 717, 720-722; 402 NW2d 81 (1986) quoting *People v Arnold*, 43 Mich 303, 305-306; 5 NW 385 (1880)). The reasoning behind the rule is that the giving of false testimony is "so unlike the conduct of innocent men that [the false statements] are justly regarded as giving some evidence of a consciousness of guilt." *Id*. at 722 (quoting *Arnold*, *supra* at 305-306).

Here, the jailhouse statements would not qualify as false exculpatory statements because defendant did not give the statements to law enforcement or through prior testimony. *People v Wackerle*, *supra*. Furthermore, the prosecution does not intend to show that the statements are false. Rather, the prosecution apparently intends to let the jury decide which statement is false. Thus, we hold that defendant's jailhouse statements do not qualify as false exculpatory statements.

Conflicting statements, however, as opposed to false exculpatory statements, do not need to be given to law enforcement or through testimony, nor do they need to be proven false, in order to be admissible as substantive evidence. Conflicting statements are two or more self-serving, contradictory, exculpatory statements regarding an incriminating fact, given out of court. *People v Cowell*, 44 Mich App 623, 624-626; 205 NW2d 600 (1973). "[C]onflicting statements tend to show a consciousness of guilt and are admissible as admissions." *Cowell*, *supra* at 625. This Court stated the rule for conflicting statements, in relevant part:

> It may be shown [] that accused made two or more conflicting statements out of court in reference to an incriminating fact; and this right is not affected by the fact that accused does not become a witness. Inconsistent statements relevant to the crime charged are not limited to use for impeachment purposes; they have

> substantive effect as tending to show a consciousness of guilt." [*Id*. at 626 (quoting 22A CJS Criminal Law § 738, pp 1094-1095).]

The two jailhouse conversations regarding defendant's possible alibi were made out of court, they conflict with the statement defendant gave to police, and are relevant to the crime charged. They are also exculpatory and self-serving. For instance, defendant told police that he and his cousin went to speak to someone and his cousin shot the man, thus placing himself at the scene. In one of the recorded telephone conversations, however, defendant indicated that a lady saw him at work until 9:00 p.m. that night so that he could not have been at the crime scene. We find that the majority of defendant's statements qualify as conflicting statements, and therefore, are relevant as circumstantial evidence tending to show defendant's guilt.

Given that the jailhouse conversations are relevant, this Court must determine whether their admission would cause unfair prejudice to defendant. The trial court agreed with defendant that the probative value of the statements is substantially outweighed by the danger of unfair prejudice to defendant. The trial court held that if the jury was presented "with evidence that there is an alibi witness who could substantiate that defendant was not at the scene of the crime, the jury would likely draw an impermissible inference of guilt from defendant's decision not to call the alibi witness." The trial court stated that defendant's situation was "similar to where a prosecutor attempts to comment on a defendant's failure to put forth an alibi defense after he has filed a notice of alibi defense . . . which is tantamount to shifting the burden of proof. . . "

Pursuant to MCL 768.20, a defendant must give the prosecutor written notice of an intent to present an alibi at least ten days before the start of the trial. The purpose of the notice requirement is to allow the prosecution "to investigate the merits of such a defense prior to trial, and not to alert the jury of the defendant's proposed defense." *People v Shannon*, 88 Mich App 138, 144; 276 NW2d 546 (1979) (citation omitted).

It is error requiring reversal for the court or prosecution to comment that a defendant has filed an alibi notice before the defendant testifies because it "constitutes an impermissible comment on the defendant's right to remain silent." *People v Hunter*, 95 Mich App 734, 738-739; 291 NW2d 186 (1980) (error requiring reversal for the prosecutor to request that the trial court take judicial notice of the defendant's alibi notice). Likewise, if a defendant gives notice of alibi, but then fails to present any alibi evidence, it is error requiring reversal for the prosecutor to comment on the failure of the defendant to call alibi witnesses. *Shannon*, *supra* at 141-143 (error requiring reversal for the prosecutor, in his closing argument, to comment that the prosecution's testimony was uncontroverted by the defendant's alibi witness, "the same witness whom the defense chose not to call.")

This Court in *Shannon* explained that the statutory notice requirement for an alibi defense puts the defendant in the position of having to serve notice, even though his defense may be incomplete at the time of filing. *Shannon*, *supra* at 144 n 3. To allow a prosecutor to comment on a defendant's failure to call alibi witnesses, after requiring him to file a notice of an alibi if there was any possibility he would present one, would be "unduly prejudicial." *Id*. In addition, this Court in *Hunter*, *supra* at 738-739, opined that "any reference made to the filing of a notice of alibi, prior to the defendant's actually putting forth an alibi defense constitutes an impermissible comment on the defendant's right to remain silent. To find otherwise would

elevate the procedural requirement of filing the notice of alibi into a waiver of defendant's substantive right to remain silent." *Id*. at 739.

Defendant argued at the motion hearing that the facts of this case are akin to defendant filing a statutory alibi notice, and the trial court agreed. However, defendant did not file a notice of alibi, and we hold that his jailhouse statements were not the functional equivalent of filing a notice of alibi. Filing a notice of alibi is a statutory requirement for a defendant to preserve the ability to present an alibi. The judiciary protects defendants from due process violations that may occur due to the statutory requirement by holding that it is error requiring reversal for the prosecution to comment on the alibi notice prior to the defendant testifying. However, in cases where the defendant does not file notice, he cannot expect the same heightened levels of protection, given that there is no case law or statute that holds that it is error requiring reversal for a prosecutor to enter into evidence a defendant's relevant statements that happen to mention an alibi.

Whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice depends on whether the evidence is only marginally probative and whether the jury will give it undue or preemptive weight. *Crawford*, *supra* 398. Here, defendant did not file a notice of alibi, and the prosecutor would not be commenting on defendant's failure to call an alibi witness. Consequently, there is only minimal danger that the jury would make any impermissible inference. Thus, the prejudicial effect of the evidence would not be substantially outweighed by its probative value. We hold that the trial court erred in its determination that the jailhouse conversations were inadmissible.

Reversed.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette